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No. 02-428

IN THE
SUPREME COURT OF THE UNITED STATES

DASTAR CORP.,
Petitioner,

v.

TWENTIETH CENTURY FOX FILM CORP., ET. AL
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Amicus Brief of Malla Pollack and Other Law Professors on Question One Supporting Dastar Corp.

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Interest of the *Amici Curiae*

Amici curiae are law professors specializing in trademark, copyright, and related subjects. None of *amici* have any financial interest in the outcome of this litigation.[1] *Amici* provide their institutional affiliations for identification purposes only; they do not purport to represent the opinions or interests of their respective institutions. *Amici*'s sole interest in this case is to encourage the proper unfolding of law in their areas of specialty.

Both parties have given permission for Pollack to file this *amicus* submission. Copies of the permission letters are attached to the proof of service submitted to the Clerk.

Summary of Argument

The plain text of the relevant statute requires reversal in this case. The Ninth Circuit has appropriated Congress' authority by nullifying one element of a statute. Congress wrote Section 43(a)(1)(A) of the Lanham Act, 15 U.S.C. § 1125(a)(1)(A), to require proof of a "likelihood of confusion" before allowing plaintiffs to limit competition due to alleged misstatements of "origin." The Ninth Circuit substitutes a judicially-created irrebuttable presumption of confusion, based solely on copying copyrightable material. In practice, the Ninth Circuit is judicially expanding the right of attribution of the Visual Artists' Rights Act to circumstances expressly excluded by Congress. Finally, the Ninth Circuit's position creates constitutional problems which should not be

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1. No party has authored this brief in whole or in part. The printing of this *amicus* filing was paid for by Malla Pollack with the generous support of the Cecil C. Humphreys School of Law of the University of Memphis.

reached absent the clearest of congressional instructions. This Court should, therefore, reverse and remand with instructions for the Ninth Circuit to adhere to the statute's enacted language.

Argument

I. The Ninth Circuit improperly nullifies the "likelihood of confusion" element required by Section 43(a)(1)(A) of the Lanham Act

The most basic rule of statutory construction is to follow the words of the enacted text. *See, e.g.,* Dept. of Housing & Urban Dev. v. Rucker, 535 U.S. 125, ___, 122 S. Ct. 1230, 1233 (2002)(relying on "plain language of the statute.").

Dastar is a case in which defendant's copying of copyrightable material[2] is attacked as "reverse passing off." The defendant at its own expense manufactured its own physical products, but these independently manufactured products resemble the plaintiffs' products.[3] The products

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2. The Ninth Circuit considered uncredited copying a violation of Lanham Act Section 43(a)(1)(A) even if the material was in the public domain. *See* Twentieth Century Fox Film Corp. v. Entm't Distrib., No. 00-56703, at 3a (9th Cir., April 9, 2002) (remanding only copyright issue) (as reproduced in App. to Dastar's Pet. for Cert.).

3. *See generally*, John T. Cross, *Giving Credit Where Credit Is Due: Revisiting the Doctrine of Reverse Passing Off In Trademark Law*, 72 Wash. L. Rev. 709, 712 (1997) (distinguishing "reverse passing off" cases which involve

embody core copyrightable subject matter. The cause of action at issue, however, is under the Lanham Act, not the Copyright Act. Both the Ninth and Second Circuits permit Lanham Act relief in such cases based merely on copying copyrightable elements, even though these courts may purport to consider the "likelihood of confusion" element of the Lanham Act.[4]

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reselling physical product manufactured by plaintiff from those in which defendant independently manufactures a product which copies plaintiff's). Cross concludes that reverse passing off is not covered by the language of Lanham Act Section 43(a) and is (with the possible exception of unique fine art pieces) an unwarranted drain on competition. *See* Cross, at 711-12. This brief does not raise such general issues.

4. *See, e.g.,* Waldman Publ'g Corp. v. Landoll, Inc., 43 F.3d 775, 781 (2d Cir. 1994) ("Consumer confusion is a separate Lanham Act requirement which we will address below . . . "). *But see id.* at 784 (concluding without analysis that "substantial similarity" creates likelihood of consumer confusion). Both sets of cases purport to grant relief under 15 U.S.C. § 1125(a)(1)(A) as opposed to § 1125(a)(1)(B). *See, e.g.,* LaMothe v. Atlantic Recording Corp., 847 F.2d 1403, 1406 (9th Cir. 1988) (asserting that claim meets first part of 43(a)(1), making analysis of "false advertising," 43(a)(1)(B), unnecessary). The *Dastar* district court based its Lanham Act holding on 15 U.S.C. § 1125(a)(1)(A). *See* Twentieth Century Fox Film Corp. v. Dastar Corp., No. CV 98-7189 FMC, n. 4 at 50a-51a (C.D. Cal., Jan. 4, 2000)(as reproduced in App. to Dastar's Pet. for Cert.).

However, in both lines of cases, the sole support for alleged "likelihood of confusion" is the similarity of copyrightable elements. The Ninth Circuit affirmed Lanham Act judgment against Dastar without any "independent showing that the [video] series manufactured by Dastar resulted in [likelihood of] consumer confusion." Twentieth Century Fox Film Corp. v. Entm't Distrib., No. 00-56703, at 3a (9th Cir., April 9, 2002) (as reproduced in App. to Dastar's Pet. for Cert.). The Ninth Circuit insisted that "the 'bodily appropriation' test subsumes the less demanding 'consumer confusion' standard." *Id.* at 4a (quoting Cleary v. News Corp., 30 F.3d 1255, 1261-62 (9th Cir. 1994))(internal quotation marks omitted). Similarly, the entire "likelihood of confusion" analysis in *Waldman* reads:

> It is inherent in Landoll's conduct that purchasers of the Landoll adaptations of these classic works will, as a result of Landoll's deceitful marketing, mistakenly believe that Landoll created the adaptations.

Waldman Publ'g Corp. v. Landoll, Inc., 848 F. Supp. 498, 504 (S.D.N.Y.), *aff'd*, 43 F.2d 755 (2d Cir. 1994).

The core problem in the analysis used by both the Ninth and Second Circuits is that reproducing copyrightable elements (even those in the public domain) creates an irrebuttable presumption of likelihood of confusion. By using this irrebuttable presumption, both Circuits functionally nullify one element of 15 U.S.C. § 1125(a)(1)(A).

Congressionally unauthorized irrebuttable presumptions amend statutes unconstitutionally. This Court rejected a similar interpretive move in Dep't of the Interior v. Klamath Water Users Protective Assn., 532 U.S. 1, 12 (2001). The Department's position transformed the Freedom of Information Act's term "intra-agency" into a "purely conclusory term, just a label to be placed on any document

the Government would find it valuable to keep confidential." *Id.* This Court recognized the absence of any "textual justification for draining [that] condition of independent vitality." *Id.* Similarly, the circuits lack any textual justification for draining "likelihood of confusion" of any independent vitality in 15 U.S.C. § 1125(a)(1)(A).

Even rebuttable presumptions must be supported by "common sense and probability," hopefully confirmed by empirical studies. *See* Basic Inc. v. Levinson, 485 U.S. 224, 245-46 (1988) (accepting rebuttable presumption). "Sweeping presumptions" which do not "comport[] with common sense and probability" are properly rejected. *See* U.S. Dep't of Justice v. Landano, 508 U.S. 165, 175 (1993) (rejecting proffered presumption; internal editing omitted).

The presumption at issue is both irrebuttable and factually unsupported. Neither the Ninth nor Second Circuits refer to any empirical "studies" as to whether the public cares if institutional "authors," editors, publishers, etc., are named on later versions of video tapes and books. The plaintiffs did not introduce survey evidence on this issue. No relevant likelihood of confusion exists if the public does not care who edited (or re-edited) these film clips, many of which "originated" with military personnel and were "originally" lodged in the National Archives.[5]

In sum, Congress requires proof of likelihood of confusion before granting relief pursuant to 15 U.S.C. § 1125(a)(1)(A). The Ninth Circuit's and Second Circuit's irrebuttable presumption that confusion is likely, based solely

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5. Dastar's tapes credit the National Archives. Defendants' credit the United States Army, Navy, and Coast Guard. Both sets of tapes were docketed by the Ninth Circuit on March 8, 2002.

on similarity, unacceptably rewrites the statute. This irrebuttable presumption changes the Lanham Act into a ban against reusing copyrightable material without attributing it to an unspecified, open-ended host of previous authors, publishers, and related functionaries – even when copying is allowed by the Copyright Act.

II. The Ninth Circuit improperly nullifies the very limited scope of the Visual Artists' Rights Act

Further, the Ninth Circuit's (and Second Circuit's) construction of Section 43(a)(1)(A) to include a right of attribution nullifies the congressionally crafted limits of the Visual Artists' Rights Act, codified at 17 U.S.C. § 106A.

Statutes must be read in context, including considering more recent and more specific enactments. "Specific policy embodied in a later federal statute should control [Court] construction" of an earlier, more generalized law. United States v. Estate of Romani, 523 U.S. 517, 530 (1998). *See also* Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) ("[T]he meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand.").

The language at issue in the Lanham Act dates from the Trademark Law Revision Act of 1988, effective Nov. 16, 1989. *See* Pub. L. 100-667, Sec.132 (completely changing text of 15 U.S.C. § 1125(a)(1), Section 43(a)(1) of the Lanham Act).[6] Attribution rights for copyrightable subject

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6. The only later modification was to the numbering, not the wording, of § 1125(a)(1). *See* Pub. L. 102-542, Section 3(c) (effective with respect to violations occurring on or after October 27, 1992).

matter were directly addressed in the more recent Visual Artists' Rights Act of 1990 ("VARA"), Pub. L. 101-650. The general language of Section 43(a)(1)(A) should, therefore, be read in light of the more recent, much more specific, provisions of VARA, codified at 17 U.S.C. § 106A.

The *Dastar* case involves audiovisual works. *Waldman* involves new editions of classic children's books. In both cases, the court required that the second publisher attribute the work to another entity – without relying on the Copyright Act. Copyright Act Section 106A (a)(1)(A),[7] creates such a right of attribution, independent of any showing that confusion is likely. That statutory attribution right, however, is expressly limited to "works of visual art" which are defined to include only works created in limited editions; the definition, additionally, expressly excludes "any . . . motion picture or other audiovisual work, book, ..." and "any work made for hire."[8] The works at issue in *Dastar* (and *Waldman)* are, therefore, expressly denied attribution rights by a more targeted, later statute.[9]

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7. "Subject to section 107 and independent of the rights provided in section 106, the author of a work of visual art – (1) shall have the right – (A) to claim authorship of that work." 17 U.S.C. § 106A.

8. 17 U.S.C. § 101 (definition of "work of visual art," paragraphs (A)(1) and (B) following phrase "[a] work of visual art does not include.").

9. *Dastar* turns on proper construction of current statute. It does not turn on whether Congress would have been

This denial of attribution rights is not a congressional oversight or a clerical error. The deliberative nature of these exclusions is emphasized repeatedly in the accompanying House Report. The final bill clarified "who is specifically excluded from the bill."[10]

> The definition of a work of visual art is a critical underpinning of the limited scope of the bill. As Representative Markey testified, "I would like to stress that we have gone to extreme lengths to very narrowly define the works of art that will be covered ***[T]his legislation covers only a very select group of artists."[11]

The Report explains that "[m]otion pictures and other audiovisual works" are carefully excluded from VARA because of "critical factual and legal differences in the way visual arts and audiovisual works are created and disseminated," differences which have "important practical consequences."[12] Primarily, motion pictures are "collaborative effort[s]," where granting attribution rights to the multiple entities involved might "conflict with the distribution and marketing" of copies[13] – as happened in *Dastar*.

In sum, even if Lanham Act Section 43(a)(1)(A) were ambiguous, it should be construed in harmony with VARA by following Congress' decision not to provide attribution rights to more than a handful of copyrightable works, not including those at issue in *Dastar*.

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more faithful to the Berne Convention if it had enacted broader attribution rights, or whether Congress should now enact broader rights. Congress plainly stated that it, not the courts, should make such decisions. *See* Pub. L. 100-568, Berne Convention Implementation Act of 1988, Sec. 2 (1) (declaring Convention "not self-executing"); *id.* Sec. 3(a) ("The provisions of the Berne Convention . . . (2) shall not be enforceable in any action brought pursuant to the provisions of the Berne Convention itself."); *id.* Sec. 3(b) ("The provisions of the Berne Convention, the adherence of the United States thereto, and satisfaction of any United States obligations thereunder, do not expand or reduce any right of an author of a work . . . (1) to claim authorship of the work . . .").

10. H. Rept. 101-650 at 7 (101st Cong., 2d Sess.), *reprinted in* 1990 USCCAN 6915, 6917.

III. The Ninth Circuit's nullification of statutory language creates unnecessary constitutional problems by enabling perpetual copyright protection.

The central issue in this case is whether federal courts may change statutes even when such amendment pushes the edges of constitutional limits. Such judicial activism seems

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11. *Id.* at 10-11, 1990 USCCAN at 6920-2621 (quoting subcommittee hearing) (editing in USCCAN).

12. *Id.* at 9; 1990 USCCAN at 6919.

13. *Id.*

contrary to standard rules of statutory construction. Respect for Congress requires the Court to refuse even "an otherwise acceptable construction of a statute" which raises "serious constitutional problems" whenever "an alternative interpretation of the statute is 'fairly possible.'" INS v. St. Cyr, 533 U.S. 289, 299-300 (2001)(citations omitted); Vt. Agency v. United States *ex rel* Stevens, 529 U.S. 765, 787 (2000) (same); Ashwander v. TVA, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) ("When the validity of an act of the Congress is drawn into question, . . . it is a cardinal principle that this Court will first ascertain, whether a construction of the statute is fairly possible by which the question may be avoided.")(citation omitted).

Courts require especially clear language before reading a statute to press Congress' constitutional limitations. *See St. Cyr*, 533 U.S. at 299 ("[W]hen a particular interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result"; invoking "plain statement rule."). Without extremely clear statutory language, the Court will not assume "that Congress intended to infringe constitutional liberties or usurp power constitutionally forbidden it." DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)(invoking canon to prevent First Amendment question regarding "truthful[]" handbills). No such clear language backs the Ninth and Second Circuits' interpretation of 15 U.S.C. § 1125(a)(1)(A), but their interpretation creates a constitutional issue.

Copyrights, like patents, are constitutionally allowable only for "limited times." U.S. Const. Art. I, sec. 8, cl. 8. Lanham Act Section 43(a), however, has no time limit. If Congress chose to bypass "limited times," this Court

would need to decide if such action was constitutional.[14] Congress, however, has not taken such action – the Ninth and Second Circuits have.

The proper length of copyrights' "limited times" is a decision assigned to Congress, not the courts. *See* Eldred v. Ashcroft, Slip. Op. at 14, No. 01-618 (U.S. Jan. 15, 2003). However, when copyrights' limited rights end, they end. *See, e.g.,* Kellogg Co. v. Nat'l Biscuit Co., 305 U.S. 111, 120 (1938) ("It is self-evident that on the expiration of a patent the monopoly created by it ceases to exist, and the right to make the thing formerly covered by the patent becomes public property.") (quoting Singer Mfg. Co. v. June Mfg. Co., 163 U.S. 169, 185 (1896)); *accord,* Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 152 (1989). The public has a right to copy and use material not protected by patent or copyright. Such use is "the essence of copyright"

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14. Presumably such a decision would require clarifying the relationship between Article I's limits and the Treaty Power, U.S. Const., Art. II, sec. 2. *Compare* Missouri v. Holland, 252 U.S. 416, 432-35 (1920) (relying on a treaty to uphold a federal statute outside Commerce Clause power as then understood) *with* Boos v. Berry, 485 U.S. 312, 324 (1988) (holding that international agreements regarding treatment of diplomats do not constitute a "compelling interest" justifying limits on picketing embassies); Reid v. Covert, 354 U.S. 1, 17 (1957) ("This Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty.")(citations omitted). The Commerce Clause alone cannot bypass "limited times." *See* Ry. Labor Executives Ass'n v. Gibbons, 455 U.S. 457, 468-69 (1982)(disallowing use of Commerce Clause to bypass uniformity limit in Bankruptcy Clause).

and a constitutional requirement. Feist Publ'ns, Inc. v. Rural Tel. Svc. Co., 499 U.S. 340, 349-50 (1991); *see also Bonito Boats*, 489 U.S. at 152 ("We have long held that at the expiration of a federal patent, the subject matter passes to the free use of the public as a matter of federal law."). The extent of the public's right is, however, unclear.

This Court has suggested in dicta that government might have the power to require later users of uncopyrighted and unpatented *res* to take some steps to limit consumer confusion. *See, e.g., Bonito Boats*, 489 U.S. at 165 ("States may place limited regulations on the use of unpatented designs in order to prevent consumer confusion as to source."); *Nabisco*, 305 U.S. at 120 ("The question remains whether Kellogg Company, in exercising its right to use the name 'Shredded Wheat' and the pillow-shaped biscuit, is doing so fairly. . . . in a manner which reasonably distinguishes its product from that of plaintiff."). Therefore, some labeling requirement or disclaimer might be constitutional if required by statute.

However, at some point, a labeling requirement, especially one that is unclear or imposed *ex post*, might impose an unacceptable burden on the public's right to copy. A judicially mandated labeling requirement is more likely to stumble over constitutional limits than a statutory one. If Congress chose to create such a labeling requirement, it would presumably write a clear statute, thus providing the notice necessary to prevent chilling effects from over-depressing competition. *See* Wal-Mart Stores, Inc. v. Samara Bros., Inc., 529 U.S. 205, 214 (2000) ("Competition is deterred, however, not merely by successful suit but by the plausible threat of successful suit," therefore, the Court refuses to accept a vague test for Lanham Act protectibility of product aspects). The constitutional limit of such a labeling requirement is not presented in this case. This case presents a much easier issue.

This case involves courts, not Congress, making uncredited reuse of copyrightable works into Lanham Act violations without any showing whatever that consumer confusion is likely – even though Congress included such an element in the statute. Instead of reading statutes to minimize constitutional issues, the Ninth and Second Circuits have ignored statutory language and, thereby, raised unnecessary constitutional questions. This Court, therefore, should enforce the statute's boundaries.

Conclusion

For all the reasons discussed above, this Court should reverse and remand with instructions for the federal judiciary to follow the language of Lanham Act Section 43(a)(1)(A).
Respectfully submitted: February _____ , 2003.

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